In contra distinction to user, however, section 97 (ii) (b) provides the sub-lessor with the remedy of cancellation "where the sub-lessee has not worked the land in accordance with clause 4 of the sub-lease in Schedule X."

Reverting to the majority view expressed in the *Hardwick Game Farm* case, I think I am on safe ground in holding that, in common parlance, "user" of land means its user in general terms, including user for the specific purposes described in sub-sections (i) to (iv) of section 14; whereas, again in common parlance, "working" mining land should be given a more restricted meaning as confined to mining operations and ancillary activities.

If this is the true view, as I think it is, it follows that clause 4 of Schedule X — whether dichotomous, as the learned judge construed it, or otherwise — confers cancellation powers on the senior inspector of mines, or the court in his place, only where the sub-lessee's liability thereto arises by reason of his default in working the land either "in an orderly, skilful and workmanlike manner" or default in working it "subject to the provisions of the Mining Enactment". In either case, "work" relates primarily to mining — certainly not agricultural user. In the words of Lord Reid then, I would apply this criterion: as far as my knowledge of usage of the English language extends to its application to the ordinary affairs of miners, I think a miner "works" land when he mines it. When he uses it for some other purpose he does not do so *qua* miner — as the facts clearly show in this case. Consequential on this view, and again following their Lordships of the courts in England, I would hold that, when clause 4 speaks of the sub-lessee working the land "subject to the provisions of the Mining Enactment," the provisions understood as so referred to would, in common parlance, be those set out in considerable detail under the heading of *Regulation of Mining Operations* in Part IX of the Enactment, sections 77 to 94.

While on the subject of the wording of clause 4 and its application to the facts of this case, it is significant to observe that the sub-lessees — insofar as the primary object and purpose of the sublease is concerned, as well as the primary interests of sublessors — were to all intents and purposes devoting their undivided attention to the task of mining, with creditable results and strictly in compliance with mining regulations and the terms and conditions of their sublease. That they erred by an infringement of section 16 (vii) alone, in no way, even remotely, affected their mining operations elsewhere upon the sub-leased land. The penalty for infringement of section 16 (vii) is expressly provided: it does not include cancellation of a sublease. For the latter remedy the respondents had to rely on clause 12 of the sublease which merely was a reproduction of section 97 (ii) (b), which in turn falls back on clause 4 of Schedule X. For the reasons above stated it is my view that an infringement of section 16 (vii) does not in law constitute a breach of clause 4. There is consequently no call for the exercise of discretion: on this point I think any expression of my views would be supererogatory.

With all respect I am unable to agree with the conclusion of the learned trial judge. I would allow this appeal with costs. As to the costs in the court below, I have no doubt that, even had the appellants been wholly successful there, the learned trial judge would have felt obliged, in the circumstances, to refuse them their taxed costs of the action in full. This is abundantly clear from his judgment and in my view he would be right to do so. I would therefore order that the appellants costs in the court below be allowed at 50 per cent of the amount taxed.

Gill and Ali F.JJ. concurred.

Appeal allowed.

Solicitors: *Lim Cheng Ean & Co.; Skrine & Co.*

HAMIDON BIN AHMAD v. COLLECTOR OF LAND REVENUE, JASIN

[O.C.J. (Sharma J.) December 19, 1969]

[Malacca — Land Reference No. 34 of 1962]

Land Laws — Land acquisition — Applicant not served with notice of acquisition of land — No claim to collector — Whether applicant can object to award — Whether court has jurisdiction — Land Acquisition Act, 1960, ss. 37 (2) & 38 (5).

In this case the government acquired land in the Mukim of Sungei Rambai, Malacca, including land belonging to the applicant. Notice of acquisition could not be sent to the applicant as he was not resident within the State of Malacca. The Collector of Land Revenue made an *ex parte* award of $280. The applicant subsequently made an objection and the collector referred the matter to the court. When the matter came on for hearing the Legal Adviser submitted that the reference was not maintainable on the following grounds: (1) the applicant not having made any claim before the collector is not a person entitled to object as contemplated by section 37(1) of the Act; (2) the court has no jurisdiction to hear the reference because the pre-requisite of a valid objection was not that the collector's award alone should not be accepted but in addition the claim should be made to the collector "in due time"; (3) the mere fact that the collector has made reference under section 38(5) of the Act is no criterion that there is jurisdiction in the court to hear such a reference; (4) as the *ex parte* award by the collector was only for $280, this was final under section 37(2) of the Act.

Held: (1) a person who is not present before the collector at the time of making the award and does not accept the award can make an objection to the award and he may under section 38(3)(b) of the Land Acquisition Act, 1960, make the objection within 6 months of the date of the award;

(2) the court had jurisdiction to hear the reference in this case, as an objection had been made in due time;

(3) as the amount claimed by the applicant in this case is in excess of $500, the collector's award was not final under section 37(2) of the Land Acquisition Act, 1960.

Cases referred to:-

(1) *Amritrav Krishna Deshpande* v. *Balakrishna Ganesh Arampurkar* (1887) I.L.R. 11 Bom. 488, 490.

(2) *The King* v. *Governor of Brixton Prison* [1937] 1 K.B. 305; [1962] 2 All E.R. 176.

(3) *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer & Anor.* [1962] 1 S.C.R. 676, 681-4.

(4) *Ezra* v. *The Secretary of State* (1903) I.L.R. 30 Cal. 36, 86.

(5) *Ezra* v. *The Secretary of State for India* (1905) I.L.R. 32 Cal. 605.

(6) *State of Punjab* v. *Qaisar Jehan Begum & Anor.* A.I.R. 1963 S.C. 1604.

LAND REFERENCE.

Applicant in person.

Abdullah bin Ngah (Legal Adviser) for the respondent.

Sharma J.: By notification No. 107 dated the 5th day of July, 1962 the Government acquired all that E.M.R. land held under Lot No. 2026 in the Mukim of Sungei Rambai measuring 28 poles, which was the property of the applicant. The land is situated within the Sungei Rambai Village itself. The owner of the land who was a teacher resided about 4½ miles away from it up to the 31st day of May, 1962. He was transferred to Kedah on 1st June 1962. In August or September 1962 he heard rumours that the Government was going to acquire his land but he took no interest or action in the matter in spite of the fact that he knew that a drain had been constructed over his land and the two shop-houses which stood on it had been demolished. He was not served with any notice of acquisition and says that because of that he did not file any objections to the acquisition or make any claim before the collector for compensation.

In the reference filed by the collector under section 38 (5) of the Land Acquisition Act, 1960 (hereinafter referred to as the Act) it is admitted that notices in Forms E, H & K were not and could not be served on the application as he was neither residing at Sungei Rambai nor anywhere within the State of Malacca. It was incumbent on the collector to serve on the applicant the respective notices referred to in sections 11, 16 and 22 of the Act. The mode of service is prescribed under section 53 and in case of failure to effect due service as prescribed under the Act, protection is given to the collector under section 56 of the Act which in effect declares that non-compliance with the provisions relating to service of notices under the Act does not invalidate any of the proceedings under the Act.

The collector made an *ex parte* award of $280 and this award, according to the record, seems to have been made on the 14th day of August, 1962. The applicant made an objection to the collector in Form N on the 20th day of September, 1962 and the collector acting under section 38 (5) of the Act referred the matter to the court on the 24th day of October, 1962. The matter came up for hearing before me and after the applicant had closed his case, the learned Legal Adviser submitted that the reference was not maintainable on the following grounds:—

(1) The applicant not having made any claim before the collector is not a person entitled to object as contemplated by section 37 (1) of the Act.

(2) The court has no jurisdiction to hear the reference because the pre-requisite of a valid objection was not that the collector's award alone should not be accepted but in addition the claim should be made to the collector "in due time."

(3) The mere fact that the collector has made a reference under section 38 (5) of the Act is no criterion that there is jurisdiction in the court to hear such a reference.

(4) As the *ex parte* award by the collector was only for $280, this was final under section 37 (2) of the Act.

I may pause here to say that objection to the jurisdiction of the court should generally be taken at the earliest opportunity. It might have been advisable for the learned Legal Adviser to have taken his objection at the very outset of the case. He, however, chose to argue the point at the close of the applicant's case. I therefore asked him whether he was prepared to be put on election. This he was not prepared to do. The practice, as far as I am aware, is that in all civil cases where the defendant wishes to make a submission of no case to meet, he has to elect not to adduce any evidence should his submission fail and it is in fact the duty of the judge to put him to that election before allowing him to make such a submission.

Section 23 of the Courts of Judicature Act 1967 gives to the High Court jurisdiction to try all civil proceedings. This jurisdiction, however, is subject to such limitations as are contained in article 128 of the Constitution. A suit or a proceeding brought for the enforcement of the rights or obligations of a person is a suit or proceeding of a civil nature. Jurisdiction, as was said by West J., in *Amritrav Krishna Deshpande* v. *Balakrishna Ganesh Arampurkar*,[1] "consists in taking cognizance of a case involving the determination of some jural relation, in ascertaining the essential points of it and in pronouncing upon them." The authority to decide a cause is what makes jurisdiction. It is the power to hear and determine. It does not depend on the regularity of the exercise of that power or upon the correctness of the decision. The jurisdiction to determine the rights or obligations of the parties is conferred by section 23 of the Courts of Judicature Act. Part V of the Land Acquisition Act prescribes the procedure as to how and by whom the court has to be approached and moved to exercise its jurisdiction. Section 37 (1) of the Act provides that:—

"Any person interested in any scheduled land who, pursuant to any notice under section 10 or 11, has made a claim to the Collector in due time and who has not accepted the Collector's award thereon, or has accepted payment of the amount of such award under protest as to the sufficiency thereof, may, subject to the provisions of this section, make objection to —

(a) the measurement of the land;

(b) the amount of the compensation;

(c) the persons to whom it is payable;

(d) the apportionment of the compensation."

The contention of the learned Legal Adviser is that it is only section 37 (1) of the Act which confers upon the court the jurisdiction to hear the application. I am afraid I am unable to find any support for that contention in the language of section 37 (1). The argument of the learned Legal Adviser is adynamic. There seems no specific provision in the Act which requires either the registered proprietor or the person interested

to file or make a claim before the collector. Section 11 of the Act requires the collector to serve a notice in Form E and it is in Form E that a reference is made to "an enquiry to hear all claims for compensation." Paragraph 2 of notice in Form E requires "all persons having interest in the said land .... to appear" before the collector at the time specified in the notice to state the various matters referred in clauses (a), (b), (c) & (d) of paragraph 2. It is to be observed that section 11 of the Act requires the collector to serve the notice on, among others, the registered proprietor. The Act nowhere lays down that if the registered proprietor fails to appear, either personally or by an agent, before the collector as required by the notice in Form E, such registered proprietor is to be deprived of any compensation under the Act. There is no peril provided for ignoring the notice of the collector and whether the registered proprietor appears before the collector or not, the collector is under section 12 required to "make full enquiry into the value" of the land according to considerations set out in the First Schedule to the Act. "Any person" in the opening words of section 37 (1) is a person who has made a claim in due time pursuant to a notice under section 10 or 11 and is a person who has not accepted the collector's award. As far as the registered proprietor is concerned, the law requires such notice to be served on him irrespective of the public notice prescribed under section 10. The expression "in due time" appearing in section 37 (1) of the Act seems to be nowhere defined. Even if I were to give it the meaning suggested by the learned Legal Adviser that such a claim should be made before or at the time of the hearing of the enquiry by the collector, it does not mean that the court has no jurisdiction to entertain the reference. A plea in limitation or a plea in the nature of limitation does not oust the jurisdiction of the court. Limitation does not in any way touch the question of jurisdiction of the court in respect of the proceedings. It is a fundamental principle of law that where there is a right there is a remedy. Any litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in some court or other unless its cognizance is either expressly or impliedly barred. The jurisdiction with reference to the subject matter of a claim depends on the allegations in the statement of claim and not upon those which may ultimately be found true. The maintainability of a suit is similarly governed by the same principles and must be dealt with on the footing of the allegations in the statement of claim being correct. If afterwards the allegations are found to be not correct, the suit is liable to be dismissed not on the ground that it is not maintainable but on its merits. The reference is made by the collector and I have for the purpose of deciding the question of jurisdiction to assume that all that is stated in the reference is correct.

It was further argued that the word "and" appearing after the words "in due time" and before the words "who has not accepted the collector's award" is conjunctive and not disjunctive. In other words, there must not only be a claim made before the collector but also the collector's award must not be accepted. Such an interpretation is only likely to lead to absurdity because a registered proprietor may not appear before the collector and may mistakenly feel confident and pin his hopes on the assumption of the justice and fairness of the award to be made by the collector. It is occasionally found necessary in the interpretation of statutes to read the conjunction 'and' as if it was 'or' and *vice versa* (see *The King* v. *Governor of Brixton Prison*[2]). If an absurdity and an obvious injustice is to be avoided and a fair interpretation put on section 37 (1) of the Act, then it means that the following three categories of persons can make an objection:—

(a) A person who has made a claim to the collector as a result of the notice.

(b) A person who has not accepted the collector's award — such a person could be a person who had made a claim or who had not made a claim.

(c) A person who has accepted the award under protest.

Section 38 (3) (b) of the Act clearly contemplates cases where the registered proprietor or a person interested is not present before the collector at the time of the making of the award and the time prescribed for making an objection in such a case is six months from the date of the collector's award. Section 18 (2) of the Indian Land Acquisition Act, 1894 is to the same effect as our section 38 (3). In the case of *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer and Another*[3] no notice of the award was given by the collector. The appellant came to know of the award nearly three years after the award and then made an application under section 18 requiring the matter to be referred for the determination of the court. It was held in that case that the award of the collector was not a decision but an offer of compensation on behalf of the Government to the owner of the property and it was not effective until it was communicated to the owner. Gajendragadkar J. (as he then was) examined the whole scheme of the Indian Act and said:—

"In dealing with this question it is relevant to bear in mind the legal character of the award made by the collector under s.12. In a sense it is a decision of the collector reached by him after holding an enquiry as prescribed by the Act. It is a decision, *inter alia*, in respect of the amount of compensation which should be paid to the person interested in the property acquired; but legally the award cannot be treated as a decision; it is in law an offer or tender of the compensation determined by the collector to the owner of the property under acquisition. If the owner accepts the offer no further proceeding is required to be taken; the amount is paid and compensation proceedings are concluded. If, however, the owner does not accept the offer s. 18 gives him the statutory right of having the question determined by court, and it is the amount of compensation which the court may determine that would bind both the owner and the collector. In that case it is on the amount thus determined judicially that the acquisition proceedings would be concluded. It is because of this nature of the award that the award can be appropriately described as a tender or offer made by the collector on behalf of the Government to the owner of the property for his acceptance. In *Erza* v. *The Secretary of State*[4] it has been held that 'the meaning to be attached to the word "award" under s. 11 and its nature and effect must be arrived at not from the mere use of the same expression in both instances but from the examination of the provisions

of the law relating to the collector's proceedings culminating in the award. The considerations to which we have referred satisfy us that the collector acts in the matter of the enquiry and the valuation of the land only as an agent of the Government and not as a judicial officer; and that consequently, although the Government is bound by his proceedings, the persons interested are not concluded by his finding regarding the value of the land or the compensation to be awarded.' Then the High Court has added that such tender once made is binding on the Government and the Government cannot require that the value fixed by its own officer acting on its behalf should be open to question at its own instance before the civil court. The said case was taken before the Privy Council in *Ezra* v. *Secretary of State for India*[5] and their Lordships have expressly approved of the observations made by the High Court to which we have just referred. Therefore, if the award made by the collector is in law no more than an offer made on behalf of the Government to the owner of the property then the making of the award as properly understood must involve the communication of the offer to the party concerned. That is the normal requirement under the contract law and its applicability to cases of award made under the Act cannot be reasonably excluded. Thus considered the date of the award cannot be determined solely by reference to the time when the award is signed by the collector or delivered by him in his office; it must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position then the literal and mechanical construction of the words 'the date of the award' occurring in the relevant section would not be appropriate.

There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect persons, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the collector; it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement the award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair-play and natural justice the expression 'the date of the award' used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words 'from the date of the collector's award' used in the proviso to s.18 in a literal or mechanical way.

In this connection it is material to recall the fact that under s. 12(2) it is obligatory on the collector to give immediate notice of the award to the persons interested as are not present personally or by their representatives when the award is made. This requirement itself postulates the necessity of the communication of the award to the party concerned. The Legislature recognised that the making of the award under s. 11 followed by its filing under s. 12(1) would not meet the requirements of justice before bringing the award into force. It thought that the communication of the award to the party concerned was also necessary, and so by the use of the mandatory words an obligation is placed on the collector to communicate the award immediately to the person concerned. It is significant that the section requires the collector to give notice of the award immediately after making it. This provision lends support to the view which we have taken about the construction of the expression "from the date of the collector's award" in the proviso to s. 18. It is because communication of the order is regarded by the Legislature as necessary that s. 12(2) has imposed an obligation on the collector and if the relevant clause in the proviso is read in the light of this statutory requirement it tends to show that the literal and mechanical construction of the said clause would be wholly inappropriate."

The judgment of the Supreme Court in *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer and Another*[3] was followed by the Supreme Court in another case, *State of Punjab* v. *Qaisar Jehan Begum and Another*[6] and I need not go into the facts of that case.

That leaves me with only one more question raised by the learned Legal Adviser and that is that as the *ex parte* award made by the collector was only for $280, that such an award was consequently final and as such the applicant was not entitled to make any objection to the collector's award. The argument ignores that section 37(2) of the Act speaks of the "total amount claimed" and not the award made by the collector. In his application that the matter be referred to court, the applicant claims a sum of $5,717.25. The finality of the award does not rest upon the quantum of the award made by the collector but upon the claim put forward by the applicant and if the applicant's claim does not exceed $500 it is only then that the collector's award is declared to be final.

In the result the points of law raised by the learned Legal Adviser fail and I have no hesitation in dismissing them with costs.

Order accordingly.

TAN KIA CHEE & ORS. v. CHAN KIAN WAH & ANOR.

[O.C.J. (Sharma J.) December 19, 1969]

[Malacca — Civil Suit No. 82 of 1966]

Negligence — What constitutes — Driving motor van with defective tyre — Whether defect could reasonably have been discovered — Liability of driver — Duty of owner of vehicle.

In this case the plaintiffs were injured when a motor van driven by the 1st defendant went diagonally across the road all of a sudden and hit the motor cycle which the 1st plaintiff was riding. The accident was caused by a defect in a tyre of the motor van which had a cut or tear. The 1st defendant did not show how the cut was caused.

Held: the cause of the accident was a defect of the tyre which might have been discovered by due diligence on the part of the first defendant, and it was his duty to stop the van or not to drive it off when he knew of the defect and by continuing to drive the van when he knew or should have known of the defect he was negligent.

Cases referred to:-

(1) *Cavanagh* v. *Ulster Weaving Co. Ltd.* [1959] 2 All E.R. 745, 751.

(2) *Fardon* v. *Harcourt-Rivington* [1932] All E.R. Rep. 81, 83.